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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-103

WILLIAMSON MARINE TRANSPORT, INC.,
TRI-W TOWING COMPANY, INC. and
GREENVILLE TOWING COMPANY, INC.,
Petitioners,

versus

LOUISIANA TAX COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Williamson Marine Transport, Inc. and Tri-W Towing Company, Inc. pray that a writ of certiorari issue to review a judgment of the Supreme Court of the State of Louisiana and in support of their petition show:

1.

OPINIONS BELOW

The First Circuit Court of Appeal for the State of Louisiana affirmed the decision of the Louisiana District Court maintaining Respondent's exception of no cause of action. The official report of the opinion of the Court of Appeal may be found in 293 So.2d 29 (La. App. 1st. Cir. 1974), a copy of which is annexed hereto. The Louisiana Supreme Court denied Petitioners' application for Certiorari or Writ of Review, which decision may be found in 294 So.2d 839 (1974). This denial was based on the ground that there was no error of law in the opinion of the Court of Appeal.

2.

JURISDICTION

The jurisdiction of this Honorable Court is invoked on the ground that the action of the Louisiana Tax Commission in assessing personal property ad valorem taxes for the years 1973 and 1974 against the barges and towboats used by Petitioners in interstate commerce on the navigable waters of the State of Louisiana renders the Louisiana Ad Valorem Tax provisions, that is, La. R.S. 47:1831 *et seq.*, and, in particular, La. R.S. 47:1982, unconstitutional in the application as violative of the Due Process Clause of the 14th Amendment to the Constitution of the United States and of the Commerce Clause of the Constitution of the United States. Petitioners seek herein a review of the decree

of the Louisiana Supreme Court which was dated and entered on May 31, 1974. The statutory provision believed to confer on this Court jurisdiction to review the decree in question by Writ of Certiorari is 28 U.S.C.A. Sec. 1257 (1966), 62 Stat. 929, as amended, 84 Stat. 590.

3.

QUESTION PRESENTED

The only question presented for review is whether the property of non-resident corporations which maintain no contacts with the State of Louisiana other than the transient presence of their personal property in Louisiana while said property is engaged solely in interstate commerce can be subjected to a personal property ad valorem tax without violating the Due Process Clause of the 14th Amendment to the United States Constitution and the Commerce Clause of the United States Constitution.

4.

CONSTITUTIONAL PROVISIONS

This case involves the Commerce Clause of the United States Constitution which provides:

> [The Congress shall have power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . U.S. Const. Art. 1, Sec. 8, Cl. 3.

This case also involves the Due Process Clause of the 14th Amendment which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; ... U. S. Const., 14th Amend.

STATEMENT OF THE CASE

Since this case was presented to the Louisiana Courts on Respondent's peremptory exception of no cause of action, the facts material to the consideration of the question presented herein are those stated in Petitioners' original petition. That petition states that Williamson Marine Transportation, Inc.'s, Tri-W Towing Company, Inc.'s and Greenville Towing Company, Inc.'s (subsequently dismissed voluntarily) businesses consist solely of the conducting of towage operations whereby the aforesaid corporations either tow barges for others from outside Louisiana into the State to the port of New Orleans, or tow their own barges from outside Louisiana to the ports of New Orleans and Baton Rouge. In either case, the aforesaid corporations own the respective towboats. All cargoes are solicited from outside the State by entities other than the aforesaid corporations. These corporations are entities organized and created under the laws of the State of Mississippi, owning no property or other assets in the State of Louisiana. None of these corporations conducts or solicits business in the State of Louisiana, and they have no offices, agents or employees in this State. None of these corporations is authorized

to do business in Louisiana. The only contact which Williamson Marine Transport, Inc. and Tri-W Towing Company, Inc. have with Louisiana is the passage of their vessels over the navigable waters of this State while engaged *exclusively* in interstate commerce. At the hearing on Respondent's peremptory exception, Petitioners conceded and thereby stipulated that Petitioners' vessels also carry cargo back up river out of the State of Louisiana, but that Petitioners do *not* solicit this cargo; it is solicited solely by corporations or other entities with which Petitioners have no affiliation.

The federal questions presented herein were raised in Petitioners' original petition filed with the District Court of the State of Louisiana. Specifically, the federal question sought to be reviewed herein was raised in Paragraph 8 of that petition, a copy of which is contained in appendix "A" annexed hereto. The Louisiana District Court maintained Respondent's exception of no cause of action thereby holding that the instant case was controlled by *Ott vs. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S. Ct. 432 (1949), and that the Louisiana Statute as applied did not violate the Commerce and Due Process Clauses of the United States Constitution. A copy of the District Court's opinion is contained in appendix "B" which is annexed hereto.

The federal question sought to be reviewed herein was also raised in Petitioners' specifications of error in their brief to the Court of Appeal for the First Cir-

cuit of the State of Louisiana, the pertinent portions of which are quoted below:

> "The District Court erred in the following respects:
>
> * * * *
>
> 2. In holding that an ad valorem tax on property engaged in interstate commerce is constitutionally valid provided only that the assessed property is habitually present within the borders of the taxing state.
>
> 3. In failing to hold that in order for a state to satisfy the requirements of the Commerce and Due Process Clauses in assessing and taxing property engaged in interstate commerce, the taxpayer must, in addition to possessing property engaged in interstate commerce within the taxing state, maintain sufficient contacts with the taxing state, such as an office, employees, agents, and/or representatives, so as to be deemed doing business in the taxing state.

The Louisiana First Circuit Court of Appeals affirmed the decision of the District Court and held that the Louisiana statutes in question as applied do not violate the Due Process and Commerce Clauses of the United States Constitution. A copy of the Court of Appeal's opinion is contained in appendix "C" which is annexed hereto.

ARGUMENT

The facts presented by this case call into question the perimeters imposed by the United States Constitution on states seeking to levy ad valorem taxes on the personal property of carriers engaged in interstate commerce. It is Petitioners' contention that to subject them to an ad valorem tax under the facts related above violates the Due Process and Commerce Clauses of the Constitution. Petitioners maintain that these clauses require that an ad valorem tax sought to be imposed on the property of a taxpayer engaged in interstate commerce must satisfy three tests:

(1) The taxpayer must maintain such minimal contacts within the taxing state so as to be deemed doing intrastate business in the state;

(2) The property sought to be taxed must be present within the taxing state;[1]

(3) The tax must be properly apportioned so that it bears a relation to the benefits afforded by the taxing state.

---

[1]In their brief to the Louisiana Court of Appeal petitioners expressed this requirement in terms of the need for situs within the taxing state. By using the word "situs" petitioners intended merely to connote "presence", but the Court of Appeal below seemed to attribute "situs" with a technical meaning. For this reason the second requirement is expressed differently herein.

The Louisiana Courts below presumably conceded that the Petitioners were correct in the above assertion insofar as the second and third requirements were concerned; these Courts, however, did not agree with Petitioners' contention that the taxpayer must be doing an intrastate business. In so holding, the Louisiana Court of Appeal below stated that the proper test to be employed in determining the constitutional validity of an ad valorem tax on personal property was found in *Ott vs. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S.Ct. 432 (1949), where the Court stated:

> The problem under the Commerce Clause is to determine "what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions." So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits or protection conferred or afforded by the taxing state. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on in the state. (Citations omitted). 69 S.Ct. at 434.

In asking this Court to review the Louisiana State Courts' disposition of these proceedings Petitioners are not suggesting that *Ott* should be overruled or that the test announced in *Ott* is incorrect. Rather Petitioners maintain that the *Ott* test quoted above was correct insofar as the facts presented therein to the Court were concerned but that the test announced in *Ott* is not complete and thus not dispositive of all fac-

tual settings. It is Petitioners' position that neither was the *Ott* Court required to pass on the question presented to this Court for review nor did that Court do so. In fact, no case involving the constitutional validity of an ad valorem tax on the personal property of an interstate carrier has decided the question presented herein.

The three leading cases dealing with the ad valorem taxation of the property of an interstate carrier are *Pullmans' Palace-Car Co. vs. Commonwealth of Pennsylvania,* 141 U.S. 18, 11 S.Ct. 876 (1891); *Ott vs. Mississippi Valley Barge Line Co., supra;* and *Braniff Airways vs. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590, 74 S.Ct. 757 (1954). In *Pullmans' Palace,* the court held that a non-domiciliary state may levy an ad valorem on the rolling stock of an interstate carrier by rail by assessment on a basis proportionate to the number of miles traversed in the taxing state over the total miles traversed in all states. In so holding, the Supreme Court held only that the railroad cars in question acquired a situs within Pennsylvania and that an apportioned ad valorem tax was constitutionally permissible. The Court was not called on to deal with the question now presented.

Ott and *Braniff* merely extended the *Pullmans' Palace* rule to watercraft and aircraft, respectively. As was the case in *Pullmans' Palace,* neither of these cases addressed itself to the question the Court is now being asked to review. *Ott* dealt purely with the second and third requirements mentioned above. The questions treated therein were strictly whether the tax-

payers' barges had acquired a situs within the taxing state and whether the tax was properly apportioned. *Braniff* concerned itself with merely the second requirement of situs. Consequently, the Court is now asked to review for the first time the question of whether the Due Process and Commerce Clauses of the Constitution require the doing of an intrastate business by an interstate carrier before a state may properly impose an ad valorem tax on the personal property of the carrier.

While, as mentioned above, no ad valorem tax case has expressly declared that this intrastate feature of the taxpayer's business is required; nevertheless, that its presence is required for the constitutionally valid imposition of an ad valorem tax on property engaged in interstate commerce can be deduced from a consideration of the very purpose the Commerce and Due Process Clauses were intended to serve.

The jurisprudence has consistently interpreted the Commerce Clause as having for its purpose the creation of an area of trade free from interference by the states. *E.g., Freeman vs. Hewit,* 329 U.S. 249, 67 S.Ct. 274 (1946). In commenting on the role of the Commerce Clause in its regulation of state activity dealing with interstate commerce, the *Freeman* Court stated:

> This limitation on State power . . . does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of imped-

> ing the free flow of trade between the States. It is immaterial that local commerce is subjected to a similar encumbrance. 67 S.Ct. at 276.

In determining whether State taxing action impedes the free flow of trade the Courts look to the local activity sought to be taxed, and, where the taxpayer carries on some local activity sufficiently separate from interstate commerce, the state tax is valid. See *Memphis Natural Gas Co. vs. Stone*, 335 U.S. 80, 68 S.Ct. 1475 (1948). Accordingly, as the *Memphis Natural Gas* Court stated:

> [A] state tax upon a corporation doing only an interstate business may be invalid under our decisions because levied . . . upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself. 68 S.Ct. at 1479.

Petitioners maintain that the local activity on which the State of Louisiana has focused in the instant case, namely, the presence of Petitioners' watercraft on the navigable waters of Louisiana, is solely of an interstate nature with the result that any tax levied upon them amounts to nothing more than a tax upon Petitioners' interstate business. The presence of Petitioners' watercraft cannot be segregated from their interstate business. Quite obviously, Petitioners could not engage in this particular mode of interstate commerce without necessarily having their watercraft within the geographical confines of Louisiana.

Apparently, the Louisiana Courts below relied heavily on the language in the *Ott* case stating that a tax is valid provided in practical operation it has relation to the opportunities, benefits or protection conferred by the taxing state. It is submitted that this statement merely is another expression of the often reiterated rule that interstate commerce can be made to bear its fair share of the cost of the local government whose protection it seeks. Petitioners contend that this rule not only does not refute the suggested requirement of minimum contacts by the taxpayer so as to be deemed doing an intrastate business but also that the *Ott* rule compels a finding that the suggested requirement be present. The requirement that the valid imposition of an ad valorem tax on Petitioners' property requires that the Petitioners be doing an intrastate business within Louisiana is nothing more than a corollary of the above rule, since, only where the entity sought to be taxed maintains minimum contacts, does that entity "seek" protection from local government. That is, if an entity does not maintain minimal contacts with the taxing state, it does not derive any real benefits from the state and cannot be taxed for its interstate commerce activities.

While recognizing the rule that interstate commerce can be made to bear its fair share of the cost of local government, the Louisiana Courts below failed to consider the significance of the rule. Rather than exploring the concept inherent in the rule, the Louisiana Courts merely used the rule as crutch to support the validity of the tax sought to be imposed on Petitioners' watercraft. But inherent in the rule is that the tax-

payer must be afforded local benefits. The Louisiana Courts were content to say that presence equals benefits, but this facile treatment is hardly adequate. The taxing state must show some *real* benefit. Petitioners urge that it is not enough to say that the taxpayers derive benefit from wharfage and from fuel and supplies purchased in Louisiana. Petitioners maintain that such "benefits" are not those contemplated by the Due Process and Commerce Clauses. It is apparent that any number of benefits can be conjured up to justify the levying of a personal property tax. Petitioners contend, however, that the Constitution requires that the benefits be related to the doing of intrastate business. That is, the benefits which justify the imposition of a personal property tax are the minimum contacts necessary to justify the imposition of a sales tax on an interstate manufacturer in *Northwestern States Portland Cement Co. vs. Minnesota*, 358 U.S. 450, 79 S.Ct. 357 (1959) or the assessing of a use tax on an out-of-state mail order firm in *National Bellas Hess, Inc. vs. The Department of Revenue*, 386 U.S. 753, 87 S. Ct. 1389 (1967). These benefits are the presence, within the taxing state of agents, employees, offices, etc. for the purpose of soliciting Louisiana business.

It is this lack of soliciting Louisiana business by Petitioners which renders the tax unconstitutional. According to the allegations of the petition and stipulation, any Louisiana business is solicited by entities other than Petitioners. Petitioners merely move barges either which they do not own or which they charter to others who in turn contract with Louisiana buyers and sellers of commodities which are shipped in the barges.

Petitioners have no direct concern with the soliciting of the Louisiana business. Petitioners have no concern whether they move empty or loaded barges, for they charge their customers towage for moving a *barge* rather than charging their customers freight for moving a *cargo*. The solicitors of the Louisiana business are those who derive benefits from Louisiana, not Petitioners. Petitioners submit that the presence of their watercraft in Louisiana is so much a part of interstate commerce that any levy on them is a tax on the interstate business itself.

The Louisiana Courts below as well as the *Pullman's Palace*, *Ott*, and *Braniff* Courts focused on the apportionment of the tax. The apportionment feature of the ad valorem tax in question is designed to assure that the tax levied does not exceed the benefits enjoyed. However, apportionment does not assure the tax of validity. Thus, in *International Harvester Co. vs. Evatt*, 329 U.S. 416, 67 S.Ct. 444 (1947), the Court stated:

> Unless a palpably disproportionate result comes from an apportionment, a result which makes it patent that the tax is levied upon interstate commerce rather than upon an intrastate privilege, this Court has not been willing to nullify honest state efforts to make apportionments. 67 S.Ct. at 447.

Absent any intrastate business or solicitation thereof a disproportionate result must obtain from an apportionment, since as related above, no benefits are derived. Thus fatal to the Louisiana Courts' reliance on

Pullman's Palace, *Ott* and *Braniff* is the absence of the very thing against which the apportionment is weighed — local benefits.

The *Ott* decision recognizes the need for a doing of intrastate business, for after stating that the tax must in practical operation have relation to the benefits afforded by the taxing state, the Court goes on to state, "Those requirements are satisfied if the tax is fairly apportioned to the *Commerce* carried on within the state." (emphasis supplied) 69 S.Ct. at 434. As mentioned above, Petitioners carry on no commerce within the State of Louisiana.

Ott also implicitly recognized this principle by specifically pointing out that the taxpayers there had offices and agents in Louisiana. The Louisiana Court of Appeal concluded that the United States Supreme Court in *Ott* did not consider the fact that plaintiffs therein had no office or agent in Louisiana as fundamental to the decision. The Court of Appeal's conclusion was apparently based on the fact that the Supreme Court made no further mention of the existence of the office or agent other than in the introductory paragraphs of the opinion. It is respectfully submitted that the Court of Appeal drew an improper inference from the Supreme Court's failure to further mention that particular aspect of the case presented to it. Further mention of that point was totally unnecessary to the decision. Had an office or agent *not* been present, it would have been appropriate for the Supreme Court to discuss this aspect of the case, but, since the office or agent was present, any comment on that point would have been pure dictum and unnecessary to the decision. Had the

Supreme Court not deemed the presence of the office or agent important, surely it would not have made mention of that presence.

Additionally, a recent opinion of this Honorable Court supports Petitioners' contention that absent the doing of intrastate business a tax levied on property engaged solely in interstate commerce is constitutionally invalid. In *United Airlines, Inc. vs. Mahin*, 93 S.Ct. 1186 (1973), the Court held valid an Illinois tax on an airline's aviation fuel stored in Illinois, loaded aboard aircraft and consumed in interstate flights. In so holding, the Court distinguished *Helson vs. Commonwealth of Kentucky*, 279 U.S. 245, 49 S.Ct. 279 (1929), stating that the tax sought to be imposed on watercraft in that state was invalid because the taxpayer was asked to bear more than his non-discriminatory share by being taxed only for passing through the taxing state's waters. The Court further stated that, under the rule of *Helson*, states over which airplanes fly will be unable to exact a tax on aviation fuel for its mere consumption over the state. The case, then, by analogy, supports to the position urged by Petitioners.

The Louisiana Court of Appeal apparently felt that reference to *Mahin* was inappropriate, since that case dealt with a use tax. In so finding, the Court relied heavily on *Pullmans' Palace Car Co. vs. Commonwealth of Pennsylvania, supra*, where the Court stated:

> Much reliance is placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one state can-

> not be taxed by another state for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore, held to impose a direct burden upon the commerce itself. (Citations omitted). 11 S.Ct. at 879.

The Louisiana Court also relied on the following statement from *Pullmans' Palace:*

> For the purposes of taxation . . . personal property may be separated from its owner; and he may be taxed on its account at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the State which imposes the tax. It is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction. (Citations omitted). 11 S.Ct. at 878.

The Louisiana Court, it is respectfully submitted, misconstrued *Pullmans' Palace* as holding that unlike a use tax the only criterion for the valid imposition of a tax on personal property is its presence within the state. And if *Pullmans' Palace* intended to say this, it is respectfully submitted that the Court incorrectly assessed the true purpose of the Commerce Clause.

The true import of the second above quoted statement from *Pullmans' Palace* is that nothing in the Constitution absolutely prohibits a tax on personal property engaged in interstate commerce and nothing in the Constitution absolutely permits it. Thus, the power to tax personal property engaged in interstate commerce is contained within the same constitutionally defined perimeters as is a tax on any other taxable event. Use taxes and personal property taxes as well as franchise taxes, income taxes and the like all require that the tax be related to some real and tangible in-state benefits. Absent minimal contacts with resultant solicitation of business no such benefits are derived. Only where a taxpayer does some intrastate business can it fairly be said that the local activity is sufficiently separate from interstate commerce. Since Petitioners do no **intrastate** business the Louisiana tax should be invalidated. To permit any other result would be to allow Louisiana to directly interfere with interstate commerce.

Absent a requirement that the prospective taxpayer be doing an intrastate business, a state could impose severe burdens on interstate commerce. Under the view espoused by Respondent and by the Louisiana court below, a state could levy a personal property tax on watercraft which merely passed through Louisiana waters without making any stops. A pleasure boat operator, who launched his craft in Mississippi waters and crossed into Louisiana waters to fish, could also be assessed with a personal property tax. Such results do an injustice to the Due Process and Commerce Clauses and, in fact, directly contravene the

bounds the Congress of the United States has seen fit to impose on state efforts to tax entities engaged in interstate commerce. See, for example, the Federal Interstate Income Law, 15 U.S.C.A. Sec. 381 (1963), 73 Stat. 555, where Congress required *more* than the minimal contact of the solicitation of business to sustain a net income tax. Certainly, the least that can be required for the valid imposition of a personal property tax on watercraft moving in interstate commerce is that the owner of that property be doing some intrastate business.

It is submitted that operations of vessels upon the Mississippi River ever since the admission of Louisiana into the Union have been treated and considered on a different basis than operations by railroads, trucking companies or airlines. The Mississippi River has always been considered an avenue of commerce for all the interior of the United States to the Gulf of Mexico. It was treated differently by Congress who, when the State of Louisiana was admitted to the Union, exempted it from any tax, duty, impost or tolls. See 2 Stat. 641 (1811) and 2 Stat. 701 (1812). *Pullmans' Palace-Car Co. v. Commonwealth of Pennsylvania, supra,* also recognized the need to treat navigable waters differently.

Consequently, this Court is not bound by and should not use cases such as *Pullmans' Palace* or *Braniff Airways vs. Nebraska State Board of Equalization and Assessment, supra,* as authority for taxing the barge lines in question. As pointed out above, the instant case does not fall within the *Ott* opinion, since Petitioners

do no intrastate business, do not solicit business in Louisiana and do not have offices or agents in Louisiana. *Ott* should be considered as dealing with a special situation different from the general rule of tax law applicable to waterway operations, since *Ott* dealt with regulated carriers which had offices and agents within Louisiana and which solicited business within the state. Accordingly, pre-*Ott* cases dealing with watercraft, such as *Hays v. The Pacific Mail S. S. Co.*, 17 How. 596 (1854) and *Morgan v. Parham*, 16 Wall. 471 (1872), should control the instant case.

7.

CONCLUSION

The bounds placed on a state seeking to levy ad valorem personal property taxes on interstate carriers have not been adequately defined. Petitioners urge that the requirement of the doing of an intrastate business is essential to the continued unfettered flow of interstate commerce and that this Court should so declare. For that reason, a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

It is certified that three copies of the foregoing petition for a Writ of Certiorari have been served by mail, by depositing same in a United States mail box, first class postage prepaid, addressed as follows:

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New Orleans, Louisiana, July ____, 1974.

_____

Attorney for Petitioners

APPENDICES

APPENDIX A

PETITION

WILLIAMSON MARINE TRANSPORT, INC.
TRI-W TOWING COMPANY
GREENVILLE TOWING COMPANY, INC.

versus

LOUISIANA TAX COMMISSION

The petition of Williamson Marine Transport, Inc., Tri-W Towing Company and Greenville Towing Company, Inc., with respect represents that:

1.

Louisiana Tax Commission is a public body, domiciled in East Baton Rouge, and this suit involves allegations that the said defendant did unconstitutionally make assessments against the plaintiffs for the year 1973.

2.

Petitioners are all companies organized and existing under the laws of the State of Mississippi, with their principal place of business in Greenville, Mississippi.

3.

They own no property in the said State, are not authorized to do business in the State, and have no agents in the State of Louisiana, and do not solicit any business in the said State.

4.

Their business consists solely of interstate commerce by which they either tow barges for others from outside the State to New Orleans or tow their own barges with their own vessels from outside the State to New Orleans and Baton Rouge. All cargoes are solicited from outside the State and no solicitation of cargo is made inside the State of Louisiana.

5.

Plaintiffs have no contact with the State of Louisiana whatsoever sufficient to create a situs for taxation of its barges and tow boats.

6.

The said plaintiffs were notified by the State Tax Commission that certain equipment which was used in interstate commerce was taxable by the State of Louisiana. The said plaintiffs were requested to file a return which was not done for the reason that the plaintiffs did not believe that, under the law and under

the Federal Constitution, they were taxable by the State of Louisiana and that they should have to file a return. In lieu thereof they filed affidavits to the effect that the said corporations had no property or assets in the State, no agents, did not conduct or solicit business, and had no employees therein.

7.

The said Tax Commission, however, overruled the protests and did declare that the said property was taxable and did make assessments for the year 1973 against the said companies as will more fully appear from copies of the said assessment marked for identification 1 through 4.

8.

Petitioners aver that the said assessments are unconstitutional, do violate the U.S. Constitution for the reason that the said barges and tow boats move in interstate commerce; that there was no contact with the State whatsoever which would allow the State to levy an assessment against the said barges moving solely in interstate commerce; that the said assessments violate the provisions of the Fourteenth Amendment by taking property without due process of law. The said tax is further unconstitutional because it is a burden upon interstate commerce and violates the commerce clause of the U.S. Constitution.

WHEREFORE petitioners pray that there be judgment in their favor and against the Louisiana State

Tax Commission declaring that the assessments against petitioners to be illegal, null and void for the reason that they are unconstitutional and violative of the Constitution of the United States.

PETITIONERS FURTHER PRAY that there be judgment therof in favor of the petitioners, ordering the said Louisiana Tax Commission to cancel the assessments against the said petitioners and declaring said assessments unconstitutional, illegal, null and void.

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APPENDIX B

WILLIAMSON MARINE TRANSPORT, INC., ET AL	NO. 162,948 DIVISION D
VS.	19TH JUDICIAL DISTRICT COURT
LOUISIANA TAX COMMISSION	PARISH OF EAST BATON ROUGE STATE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT ON PEREMPTORY EXCEPTION OF NO CAUSE OF ACTION

The plaintiffs are engaged in the business of towing barges from above Louisiana down the Mississippi River to Baton Rouge and New Orleans. Their petition recites that they are not authorized to do business in Louisiana, they maintain no agents in Louisiana, solicit no business in Louisiana, and are engaged solely in the interstate commerce of towing cargo to Louisiana ports. (Counsel for plaintiffs conceded on the hearing of the exception that the plaintiffs' vessels not only deposit cargo in Louisiana ports but also pick up cargo or barges to be towed back upriver.)

The plaintiffs have sued the Louisiana Tax Commission to cancel assessments made against them for ad valorem personal property taxes. The plaintiffs claim that the State of Louisiana cannot levy a personal property tax against their boats and barges without doing violence to the Commerce Clause of the U.S. Constitution and the Due Process Clause of the Fourteenth Amendment.

Plaintiffs do not say that the Tax Commission has unfairly apportioned the tax assessments in question. They merely charge (1) that there is not sufficient connection between the State of Louisiana and their towing business to support the tax here levied, and (2) that the challenged tax places an undue burden on interstate commerce.

The Tax Commission has filed a peremptory exception of no cause of action, arguing that the instant case is conclusively determined by the decision of the U.S. Supreme Court in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 69 S.Ct. 432 (1949). The court finds that the *Ott* case and the associated jurisprudence of the Supreme Court does indeed dispose of all of the plaintiffs' contentions and requires, from the facts alleged in plaintiffs' petition, that judgment be given as a matter of law in favor of the defendant Tax Commission.

The allegation in plaintiffs' petition that "plaintiffs have no contact with the State of Louisiana ... sufficient to create a situs for taxation of its barges and tow boats" is not a well-pleaded fact that must be taken as true for the purpose of determining the exception. Rather, it is a legal conclusion which restates the very constitutional point at issue.

It is well settled that the states have the right under the U.S. Constitution to levy ad valorem taxes on the instrumentalities of interstate commerce, such as trains, airplanes and vessels, as long as such taxes are properly apportioned to the amount of commerce

carried on in the taxing state. *Norfolk and Western Ry. Co. v. Missouri State Tax Commission,* 390 U.S. 317, 88 S.Ct. 995 (1968); *Central Railroad Co. of Pennsylvania v. Pennsylvania,* 370 U.S. 607, 82 S.Ct. 1297 (1962); *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment,* 347 U.S. 590, 74 S.Ct. 757 (1954); *Standard Oil Co. v. Peck,* 342 U.S. 382, 72 S.Ct. 309 (1952); *Ott v. Mississippi Valley Barge Line Co., supra; Johnson Oil Refining Co. v. Oklahoma,* 290 U.S. 158, 54 S.Ct. 152 (1933); *Cleveland, C.C. & St. L. Ry. Co. v. Backus,* 154 U.S. 439, 14 S.Ct. 1122 (1894); *Pullman's Palace-Car Co. v. Pennsylvania,* 141 U.S. 18, 11 S.Ct. 876 (1891); *District of Columbia v. Smoot Sand & Gravel Corp.,* 184 F.2d 987 (CA D.C. 1950); 26 ALR2d 1376.

The test to determine whether a state tax on an instrumentality of interstate commerce is constitutional is stated in *Ott:*

> "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' (citation omitted) So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state (citing Wisconsin v. J.C. Penney Co., 311 U.S. 435, 61 S.Ct. 246 [1940]). Those requirements are satisfied if the tax is fairly apportioned to the commerce

carried on within the State. 336 U.S. at 174, 69 S.Ct. at 434."

The plaintiffs' vessels are continuously operating up and down the Mississippi in Louisiana. The plaintiffs enjoy the benefits of fire and police protection, dock facilities, traffic and navigational regulation, and the whole host of tangible and intangible benefits afforded by the State of Louisiana and its subdivisions "by the fact of being an orderly, civilized society." *Wisconsin v. J.C. Penney Co., supra.* Clearly there is a sufficient connection between the tax here challenged and benefits conferred on the plaintiffs by the State of Louisiana to meet the due process standard articulated in the cited cases.

A reading of the cases in the area reveals that the presence of an office or an agent in the taxing state is not at all a prerequisite to the *Ott* holding. Indeed the authority of the state to collect property taxes on instrumentalities of interstate commerce is grounded simply on the habitual presence of the assessed property within the borders of the taxing state.

For the above and foregoing reasons, the peremptory exception of no cause of action is sustained and plaintiffs' suit is dismissed.

Judgment will be signed accordingly.

September 20, 1973.

/s/ MELVIN A. SHORTESS
JUDGE

APPENDIX C

WILLIAMSON MARINE TRANSPORT, INC. ET AL
VERSUS
LOUISIANA TAX COMMISSION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT
NUMBER 9,751

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, HONORABLE MELVIN A. SHORTESS, JUDGE PRESIDING

Before: Landry, Ellis and Pickett, JJ
Pickett, J.

The plaintiffs, Williams Marine Transport, Inc., Tri-W Towing Company and Greenville Towing Co., Inc., corporations organized and existing under the laws of the State of Mississippi with their principal place of business in Greenville, Mississippi, instituted this action against the Louisiana Tax Commission, in which they seek to have a tax assessment for the year 1973 declared unconstitutional, and to have the assessment cancelled. By supplemental petition plaintiffs, also, seek to have a tax assessment for the year 1974 declared illegal, null and void for the alleged reason that it is likewise unconstitutional. The defendant answered plaintiffs' original and amending petitions with a general denial of plaintiffs' right to the relief sought; with affirmative averments that the tax assessments challenged by plaintiffs are proper exercises of the taxing power of the State of Louisiana, and do not violate

the United States Constitution. Thereafter, the defendant filed a peremptory exception of no cause of action. The suit of plaintiff, Greenville Towing Company, Inc., was dismissed on its own motion. The trial court sustained defendant's exception of no cause of action and dismissed plaintiffs' suit. Plaintiffs, Williams Marine Transport, Inc. and Tri-W Towing Company, Inc., have appealed devolutively.

Our jurisprudence is well settled that in resolving issues raised by an exception of no cause or right of action, all well pleaded facts must be accepted as true. Spiers v. Davidson, 233 La. 239, 96 So.2d 502; Elliott v. Dupuy, 242 La. 173, 135 So.2d 54.

The following facts are alleged in appellants' original and supplemental petitions: The appellants are foreign corporations whose principal place of business is Greenville, Mississippi. Their business consists solely of interstate commerce. They tow cargo laden barges for themselves or others from outside the State of Louisiana to the ports of Baton Rouge and New Orleans. Counsel for appellants conceded at the hearing on the peremptory exception, and stipulated in their brief to this court, that their vessels not only carry cargo to the Louisiana ports, but that they pick up cargoes in Louisiana to be carried back up the Mississippi River, out of the State of Louisiana. Appellants have no offices, agents or employees in Louisiana; they are not authorized to do business in the State, and they own no property in Louisiana. All cargoes are solicited from outside of Louisiana. The Louisiana Tax Commission levied an ad valorem personal property tax on

the barges and tugboats used by appellants on the navigable waters of the State of Louisiana for the years 1973 and 1974.

The appellants claim these assessments on their personal property used in interstate commerce violate the Due Process Clause of the Fourteenth Amendment, and the Commerce Clause of the United States Constitution. They contend their personal property used in interstate commerce is immune from taxation by the State of Louisiana because they do not maintain minimum contacts with the State in the form of an office, agent, representative or employee within Louisiana, so as to be deemed to be doing business in the State.

The defendant contends the assessments complained of by the appellants were properly made pursuant to R.S. 47:1984, Act No. 59 of 1944, and that the right of the State of Louisiana to impose an ad valorem tax on barge lines operated in the manner appellants operated their barge lines was conclusively settled by the United States Supreme Court in Ott v. Mississippi Valley Barge Line, et al., 336 U.S. 169, 69 S.Ct. 432 (1949). Defendant points out that the assessments in the instant case were made as aforesaid under Act No. 59 of 1944 which is the same Act that was before the Court in the Ott case.

The appellants point out that there is a fundamental difference in the facts in the instant case and the facts in the Ott case. In the Ott case each of the owners of the barge lines involved had an office in the State of Louisiana, but in the instant case neither of the ap-

pellants had an office, agent, representative or employee in Louisiana. Therefore, they argue that the Ott case did not dispose of all the issues involved in the instant case. The appellants list three requirements, which they contend are necessary to justify the imposition of an ad valorem tax on personal property engaged in interstate commerce, as follows:

> "(1) The taxpayer must maintain such minimal contacts within a state so as to be deemed doing business in the state for tax purposes; (2) the property sought to be taxed must have acquired a taxable situs within the taxing state; (3) the tax must be properly apportioned so that it bears a relation to the benefits afforded by the taxing state."

Appellants concede the Ott case disposed of the second and third requirements listed above. They admit their personal property has acquired a tax situs in Louisiana and that the tax is properly apportioned. But the appellants argue they have not maintained minimum contacts with the State of Louisiana in the form of an office, agents or employees within the State so that they could be deemed to be doing business in Louisiana. In support of their contention, appellants point out that the Supreme Court in the Ott case stated that each of the plaintiffs had an office or agent in Louisiana. However, the Supreme Court made no further mention of the fact that each of the plaintiffs had an office or agent in Louisiana. R.S. 47:1984, the statute the Court had under consideration in the Ott case, makes no mention of the exemption from taxation of

those who have no office or agents in Louisiana. The Court was bound to construe the statute as written. Arkansas Oak Flooring Co. v. Louisiana and Arkansas Ry. Co., 166 F.2d 98. We conclude the Supreme Court in the Ott case did not consider the fact that each of the plaintiffs had an office or agent in Louisiana fundamental to the decision of the Court.

In further support of their position the plaintiffs cite Atlantic & Pacific Telegraph Co. v. City of Philadelphia, 190 U.S. 160, 23 S.Ct. 817 (1903), and Spector Motor Service, Inc. v. O'Conner, 340 U.S. 602, 71 S.Ct. 508 (1953). However, both of these cases involve a privilege tax, and, therefore, are not apposite to the instant case which involves an ad valorem tax. Appellants cite National Belles Hess, Inc. v. The Department of Revenue, 386 U.S. 753, 87 S.Ct. 1389 (1967), and other cases involving use taxes. Privilege and use taxes are not in issue here. Defendant-appellee in the instant case is claiming an ad valorem tax, and not a use, or privilege tax. The Supreme Court of the United States in Pullman's Palace Car. v. Commonwealth of Pennsylvania, 141 U.S. 18, 11 S.Ct. 876 (1891) commenting on this issue, said:

> "Much reliance is placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those cases the tax was not upon the property employed in the business, but up-

on the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself." (Citations omitted)

* * * *

"The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; it is not a tax on or because of the transportation or the right of transit of persons or property through the state to other states or countries. The tax is imposed equally on corporations doing business within the state, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the state is, in substance and effect, a tax on that property."

In the Pullman's Palace Car Company case, supra, the Court made the following comments:

"For the purpose of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner; and *be taxed on its account at the place where it is*, although not the place of his own domicile, and even if he is not a citizen or a resident of the state which imposes the tax." (Emphasis supplied and citations omitted)

* * * *

> "It is equally well settled that there is nothing in the constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction."

The United States Supreme Court has consistently confirmed the rightful power of a state to levy and collect taxes on personal property, whether used in interstate commerce or otherwise, found within its territorial limits, if and when it chooses, by appropriate legislation. See Mayre v. Railroad Co., 127 U.S. 117, 8 Sup.Ct. Rep. 1037.

Our review of the authorities cited by appellants fails to convince us that a non resident owner's personal property, used in interstate commerce within the boundaries of Louisiana, is not subject to an ad valorem tax, unless such non resident has an office or agent in the State. The test, as was appropriately pointed out by the trial judge in his written reasons for judgment in the instant case, to determine whether a state ad valorem tax on personal property used in interstate commerce is constitutional is found in Ott v. Mississippi Valley Barge Line Co., supra, as follows:

> "The problem under the Commerce Clause is to determine 'what portion of an interstate organism may be appropriately attributed to each of the various states in which it functions.' Nashville, C. & St. L. R. Co. v. Browning, 310

U.S. 362, 365, 60 S.Ct. 968, 970, 84 L.Ed. 1254. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing state. See Wisconsin v. J.C. Penny Co., 311 U.S. 435, 444, 61 S.Ct 246, 249, 85 L.Ed. 267, 130 A.L. R. 1229. Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on in the state."

For the reasons herein set forth, and based upon the authorities cited, we are of the opinion that the tax in question is constitutional and valid. Appellants do not complain of any error in the apportionate of the assessment. We find no error in the judgment appealed from.

For the foregoing reasons, the judgment of the trial court is affirmed; the appellants to pay all costs of this appeal.

Affirmed.

APPENDIX D

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

NO. 162-948 DIVISION "D"

WILLIAMSON MARINE TRANSPORT, INC.
TRI-W TOWING COMPANY, INC.
GREENVILLE TOWING COMPANY, INC.

VS.

LOUISIANA TAX COMMISSION

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

This cause came on to be heard on a peremptory exception of no cause of action on the 4th day of September, 1973.

Present: Richard B. Montgomery, Jr. and Machale A. Miller, Attorneys for Plaintiffs
Henry P. Julien, Jr. and Donald C. Theriot, Attorneys for Defendant

After hearing argument the Court did render written reasons on the 21st day of September, 1973, maintaining the exception of no cause of action and dismissing plaintiffs' suit.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendant, Louisiana Tax Commission, and against the plaintiffs, Williamson Marine Transport, Inc. and Tri-W Towing Company, Inc., dismissing this action at plaintiffs' cost.

Judgment read, rendered and signed in open Court this 19th day of October, 1973, at Baton Rouge, Louisiana.

/s/ MELVIN A. SHORTESS
JUDGE

APPENDIX E

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

WILLIAMSON MARINE TRANSPORT, INC. ET AL — MAY 31, 1974

v.

LOUISIANA TAX COMMISSION — NO. 54,816

In re: Williamson Marine Transport, Inc., Tri-W Towing Co., Inc., and Greenville Towing Co., Inc. applying for certiorari or writ of review to the Court of Appeal, First Circuit, Parish of East Baton Rouge

Writ Denied:

No error of law.

/s/ AT Jr.
/s/ JWS
/s/ FWS
/s/ MEB
/s/ JAD
/s/ PFC
/s/ WFM

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans, May 31, 1974

/s/ Phil Trice
Deputy Clerk